In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-616

THE STATE OF NEW YORK,

Appellant,

— against —

CATHEDRAL ACADEMY,

Appellee.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

Filed October 29, 1976

Jurisdiction Postponed February 22, 1977

TABLE OF CONTENTS

DOCKET ENTRIES.

New York State Court of Claims

Claim No. 56557

DATE	PROCEEDINGS
September 6, 1972	Claim filed
November 23, 1973	Motion by claimant for summary judgment filed (Motion Number M-15976).
December 26, 1973	File Stipulation of Substitution of Counsel for Claimant.
April 2, 1974	Decision filed
April 22, 1974	Judgment dismissing claim filed
May 15, 1974	Notice of Appeal to Appeliate Division, Third Department, filed.
May 6, 1975	Order of Appellate Division affirming judgment, filed.
May 29, 1975	Notice of Appeal to the Court of Appeals, filed
July 15, 1976	Remittitur of New York State Court of Appeals filed.
December 16, 1976	Judgment following decision in Court of Appeals, filed.

NOTICE OF MOTION FOR SUMMARY JUDGMENT.

COURT OF CLAIMS
STATE OF NEW YORK

Claim No. 56557

[SAME TITLE]

PLEASE TAKE NOTICE, that upon the annexed affidavit of Leo P. O'Brien, verified the 20th day of November, 1973, and upon the Claim herein, the above Claimant, by its attorney, Charles J. Tobin, Jr., will move this court at motion term to be held at the Court of Claims, South Mall Justice Building, Albany, New York, on the 4th day of December, 1973 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order directing the entry of summary judgment for claimant upon the claim attached to the motion papers and further relief as may seem just and proper.

Dated: Albany, New York
November 20, 1973

NOTICE OF MOTION FOR SUMMARY JUDGMENT.

Yours, etc.,

CHARLES J. TOBIN, JR.
Attorney for Claimant
Office and P. O. Address
100 State Street
Albany, New York

To:

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Office and P. O. Address
State Capitol
Albany, New York

CLERK OF THE COURT OF CLAIMS
Office and P. O. Address
Governor Alfred E. Smith Office Building
Albany, New York

AFFIDAVIT OF LEO P. O'BRIEN.

STATE OF NEW YORK
COURT OF CLAIMS

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF ALBANY, *ss.*:

LEO P. O'BRIEN, being duly sworn, deposes and says:

1. I am Vice President of Cathedral of the Immaculate Conception and am fully familiar with the facts and circumstances herein. I make this affidavit in support of claimant's motion for summary judgment.

2. On June 8, 1972, Chapter 996 of the 1972 Laws of New York became law, conferring jurisdiction upon this Court

> to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regualtion. The base of said claim or claims is that the State of New York represented to said

> schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

3. Claimant, both before and after July 1, 1970, has rendered services for examination and inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance or records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation.

4. Subsequent to the passage of Chapter 138 of the 1970 Laws of New York, claimant became eligible for reimbursement by the State for the costs incurred in providing the above services.

5. Claimant duly applied and was reimbursed by the State for the costs it incurred in providing the above services mandated by law for the school year 1970-71.

6. Claimant budgeted for, and relied on eventual receipt of, similar reimbursement pursuant to Chapter 138 for the school year 1971-72.

AFFIDAVIT OF LEO P. O'BRIEN.

7. Claimant duly filed an application for reimbursement, State Education Department Form SA-170, for the school year 1971-72. A true copy of the Form SA-170 is appended hereto as Exhibit A.

8. In January, 1972, claimant received a payment from the State in the amount of $7,347.28 as reimbursement for the costs it incurred in providing the services mandated by law for the first half of the school year 1971-72.

9. Claimant provided the above services for the remainder of the school year 1971-72, but it has not yet been reimbursed for so doing.

10. The instant claim, a copy of which is appended hereto as Exhibit B, was filed on September 6, 1972.

11. No other request for the relief prayed for herein has been made.

WHEREFORE, it is respectfully requested that claimant's motion for summary judgment be granted, and that judgment be entered on behalf of the claimant in the amount of $7,347.29.

/s/ LEO P. O'BRIEN

Sworn to before me this
20th day of November, 1973.

/s/ JAMES W. SANDERSON

[Stamp]

Exhibit A – Form SA-170, Application for Reimbursement, School Year 1971-72 attached to O'Brien Affidavit.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
OFFICE FOR NONPUBLIC SCHOOL SERVICES
WASHINGTON AVENUE
ALBANY, NEW YORK 12224

MANDATED SERVICES
APPLICATION FOR NONPUBLIC SCHOOL
APPORTIONMENT
CHAPTER 138 OF THE LAWS OF 1970

1971-72 School Year — Form SA-170

INSTRUCTIONS

Each nonpublic school meeting the requirements set forth in the Guidelines and desiring to make application for aid based on attendance should complete two copies of this application in pen or by typewriter. The Guidelines contain detailed instructions for completing this application. One completed copy of this application must be filed with the Office for Nonpublic School Services by October 1. One copy should be retained by the school.

1. Name of nonpublic school CATHEDRAL ACADEMY
2. Identification No. 01-01-00-11-5670
3. Location No. and Street 75 Park Avenue
   City, Town or Village Albany N.Y.
   Zip Code 12202 County Albany
4. Mailing address of school
   No. and Street 75 Park Avenue
   Post Office _____ N.Y.
   Zip Code 12202 County Albany
5. Name of corporate entity ALBANY DIOCESAN SCHOOL BOARD, INC.
6. Mailing address of entity
   No. and Street 40 North Main Avenue
   Post Office _____ N.Y.
   Zip Code 12202 County Albany

Exhibit A — Form SA-170, Application for Reimbursement, School Year 1971-72 attached to O'Brien Affidavit.

7. Date school registered _____

8. Registered name _____

9. Date entity incorporated October 23, 1971

10. Incorporation name ALBANY DIOCESAN SCHOOL BOARD, INC.

11. Religious affiliation ROMAN CATHOLIC

12. Name of person completing this form Sister Anne Martin, C.S.J.

13. Telephone of person completing this form 448-5222 (Area Code) 518

I, REVEREND THOMAS J. MALONEY the undersigned, do hereby make application to the Commissioner of Education for the apportionment provided for in Chapter 138, Laws of 1970 and further certify with reference to the nonpublic school above that:

1. It is a nonprofit school in the State, other than a public school, which provides instruction in accordance with section 3204 of the Education Law.

2. It is providing instruction for all students without regard to race, color, religion, creed or national origin. If the school is a religious or denominational educational institution, students otherwise qualified have the equal opportunity to attend therein without discrimination because of race, color or national origin in accordance with section 313 of the Education Law, and the school has filed with the Commissioner a statement in accordance with section 313 of the Education Law. (NEW APPLICATION ONLY)

3. It is keeping an accurate record of the attendance of minor children attending such school in the form prescribed by the Commissioner in accordance with section 3211 of the Education Law.

Exhibit A — Form SA-170, Application for Reimbursement, School Year 1971-72 attached to O'Brien Affidavit.

4. It is providing equivalent instruction for all children in the first eight grades in arithmetic, reading, spelling, writing, English language, geography, United States history, civics, hygiene, physical training, New York State history and science, and in grades nine through twelve in English, civics, and American history, in accordance with section 3204 of the Education Law.

5. It is observing the provisions of sections 801-811 and is providing instruction in the special areas required by the Education Law as follows:

   a) Patriotism and citizenship for all pupils over eight years of age;
   b) Correct use and display of the flag;
   c) Physical training for all pupils over eight years of age;
   d) Physiolgy and hygiene, including the nature and the effects on the human system of:
      1) alcoholic drinks
      2) narcotics and habit-forming drugs (applies to courses of study beyond the first eight years);
   e) The provisions of the Constitution of the United States in the eighth and higher grades;
   f) Highway safety and traffic regulations;
   g) Fire prevention and fire drills;
   h) Observe Conservation Day and provide instruction in this area;
   i) The humane treatment of animals and birds (in the elementary grades);

6. It is staffed by teachers who are certified by the Commissioner or who meet all the requirements of the school in which they teach for the position in which the teacher serves, as certified by the chief administrative officer of the school.

7. It is complying with section 3002 of the Education Law by having all teachers in the school take the oath of allegiance.

8. It is conducting three civil defense shelter drills during each school year.

Exhibit A — Form SA-170, Application for Reimbursement, School Year 1971-72 attached to O'Brien Affidavit.

9. It has submitted the attendance report AT6N, Secondary School Reports and Basic Educational Data System (BEDS) Report as applicable and as required in accordance with the Commissioner's Regulations and these Guidelines.

10. It has submitted the Pupil Evaluation Program Tests for third and sixth grades. Pupils who normally will be taking Regents or equivalent level courses are considered to be above the minimum competence level of the ninth-grade reading and arithmetic tests and may be excused from taking these tests.

11. It has submitted the Certificate of Religious or Denominational Institution as required by section 313 of the Education Law in those instances wherein the school has elected to request such exceptions.

Affidavit of Chief Administrative Officer

(All nonpublic schools must complete Part I; nonpublic schools which are not incorporated must complete Part II.)

State of New York) ss
County of Albany)

Reverend Thomas J. Maloney Chief Administrative Officer of Cathedral Academy, Albany, being duly sworn, deposes and says that all statements in this application are true to the best of his knowledge.

Signature /s/ Thomas J. Maloney
Chief Administrative Officer

Title Superintendent of Schools

Exhibit A — Form SA-170, Application for Reimbursement, School Year 1971-72 attached to O'Brien Affidavit.

I, Reverend Thomas J. Maloney, the undersigned do certify that the corporate entity to which apportionments shall be made in behalf of Cathedral Academy, Albany school is as follows Albany Diocesan School Board, Inc. and request that the Commissioner of Education approve such corporate entity for the purposes of Chapter 138 of the Laws of 1970.

Signature /s/ Thomas J. Maloney
Chief Administrative Officer

Title Superintendent of Schools

Subscribed and sworn to before me this 5th day of November 1971.

/s/ [Signature Illegible]
Notary Public

Exhibit B – Claim, filed 9-6-72 attached to O'Brien Affidavit.

STATE OF NEW YORK
COURT OF CLAIMS

Justice Bldg., South Mall
Albany, N. Y. 12223

John J. Clark
Chief Clerk of the Court

FRED A. YOUNG
Presiding Judge
RICHARD S. HELLER
SIDNEY SQUIRE
RONALD E. COLEMAN
JOHN H. COOKE
JOHN P. GUALTIERI
DOROTHEA E. DONALDSON
HENRY W. LENGYEL
MILTON ALPERT
DANIEL BECKER
ADOLPH C. ORLANDO
ROBERT J. MANGUM
JOSEPH MODUGNO
ROBERT M. QUIGLEY
FRANK S. ROSSETTI
Judges

September 11, 1972

Charles J. Tobin, Jr., Esq.
100 State Street
Albany, New York 12207

Dear Sir:

This is to acknowledge receipt in this office on September 6, 1972 of original and twleve copies of the claim of CATHEDRAL ACADEMY against the STATE OF NEW YORK, the amount claimed being $ 7,347.29.

Said claim has been filed in this office as of September 6, 1972 subject to whatever legal objections may apply thereto and has been given the claim No. 56557.

Exhibit B – Claim, filed 9-6-72 attached to O'Brien Affidavit.

Your attention is directed to letter of Presiding Judge Fred A. Young, a copy of which is enclosed.

Very truly yours,

/s/ John J. Clark

JOHN J. CLARK
CHIEF CLERK

JJC:kvp
Enc.

State of New York--Court of Claims
Cathedral Academy, Claimant
against Claim No._____
THE STATE OF NEW YORK

1. The post office address of the claimant herein is 75 Park Avenue, Albany, New York.

2. This claim is made pursuant to Chapter 996 of the Laws of 1972 for funds expended by claimant as set forth in said chapter; a copy of which is incorporated herein by reference.

3. The claimant duly made application under Chapter 138 of the Laws of 1970 for reimbursement for services rendered in the school year 1971-72 and received payment in 1972 of one-half of the annual sum provided by such law.

4. The claimant operates a nonprofit, nonpublic school duly existing under the laws of New York, and has rendered the services referred to in Chapter 996 of the Laws of 1972 and is entitled to such reimbursement in full as provided by Chapter 138 of the Laws of 1970.

5. This claim is filed on or before September 6, 1972 as required by Chapter 996 of the Laws of 1972.

Exhibit B — Claim, filed 9-6-72
attached to O'Brien Affidavit.

6. The particulars of claimant's damages are listed in the print-out sheets supplied by the Department of Audit and Control, State of New York, showing the second half payment under the Mandated Services Act due and payable no later than June 15, 1972. A copy of the relevant portion is incorporated by reference.

7. Wherefore, claimant demands judgment against the State of New York for the sum of $ 7,347.29.

Charles J. Tobin, Jr.
Attorney for Claimant

Office and Post Office Address
100 State Street
Albany, New York 12207

STATE OF NEW YORK
ss:
COUNTY OF Albany

Leo P. O'Brien , being duly sworn, deposes and says that deponent is the Vice-President of claimant, Cathedral of the Immaculate Conception the corporation named in the within action; that deponent has read the foregoing claim and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because Cathedral of the Immaculate Conception , is a corporation. Deponent is an officer thereof, to-wit, its Vice-President

/s/ Leo P. O'Brien

/s/ Anne G. Walton

Sworn to before me, this
day of 24, August , 1972
ANNE G. WALTON
Notary Public, of New York State
Qualified in Albany County

TRANSCRIPT OF PROCEEDINGS.

At a Motion Term of the Court of Claims of the State of New York, held in the Justice Building, City and County of Albany, on the 21st day of December, 1973.

[SAME TITLE]

Before:

HONORABLE WILLIAM L. FORD,
Judge of the Court of Claims.

Appearances:

For the Claimant:

DAVIS POLK & WARDWELL, Esqs.,
1 Chase Manhattan Plaza,
New York, N. Y.

By: RICHARD E. NOLAN, Esq., and
THOMAS J. AQUILINO, JR., Esq.,
of Counsel.

For the State:

HONORABLE LOUIS J. LEFKOWITZ,
Attorney General.

By: KENNETH J. CONNOLLY,
Assistant Attorney General.

THE COURT: Scheduled for argument this morning is Motion No. M-15976 in Claim No. 56557, Cathedral Academy, Claimant, against the State of New York.

Are both sides ready on the motion?

MR. NOLAN: Ready for the Claimant.

MR. CONNOLLY: The State is ready, Your Honor.

THE COURT: The Claimant may proceed.

You are Mr. Nolan?

MR. NOLAN: I am Richard E. Nolan of Davis, Polk & Wardwell of New York City. We represent Cathedral Academy in this claim.

This is a motion by Cathedral Academy for summary judgment on its claim in the amount of $7,347.29, which claim was filed pursuant to Chapter 996 of the Laws of 1972, which was a statute enacted by the legislature, which sought to provide a means of reimbursing to non-public schools certain funds which these schools had budgeted for and expended in reliance on the provisions of the Mandated Services Act, which was declared unconstitutional by the United States District Court for the Southern District of New York in the Spring of 1972, which decision was, thereafter, affirmed by the Supreme Court by an eight to one margin in 1973, June.

What is being sought here, Your Honor, is not any sort of prospective relief. What we are seeking here is to obtain for Cathedral Academy the money which it had budgeted for and expended and which it would have received but for the decision of the District Court, which came down in the middle of the spring. The funds we are talking about here constitutes one-half of the amount Cathedral Academy would be entitled to receive in the 1971-1972 school year.

The State had already paid the first installment prior to the District Court's decision. The District Court's decision came down in the spring—the middle of the spring term; the judgment on that decision was not entered until June 1 of 1972, by which time the commitments of Cathedral Academy and various other schools had already become fixed in terms of budgeting and so forth, which had been established earlier in the year.

If I could back up just a moment? The reason for the enactment of Chapter 996 was to alleviate the condition of the non-public schools with respect to these Mandated Services Funds. If I may briefly describe the sequence of events in Mandated Services, in which my firm was counsel for a number of non-public schools, including Cathedral Academy, as intervenors.

In 1970, July 1970 the legislature enacted the Mandated Services Act. This was a substitute that was intended to provide funds to the non-public schools for services, which they were required to perform under various State laws, for example, the keeping of attendance records; the administration of examinations; all of these things were matters which were mandated by State law. The legislature felt that since these were mandated by State law it was only fair that the State should compensate the non-public schools for services, which they were required by State law to do and which perhaps if they did not do these services, perhaps the State would have to step in and do it, as for example, maintain attendance records by having a State employee in the school to make sure that these records were properly kept and so forth, and it was felt that it would be better to have this done by the schools themselves and a formula was

worked into the Statute with respect to the amount that was on a per pupil basis with the amounts varying in high school and in elementary school. This act was enacted in July 1970 to become effective September 1970, the beginning of the following year. On July 30, 1970 an organization known as the Committee For Public Education and Religious Liberty brought suit against the Governor, the Comptroller, Commissioner of Education claiming that the Mandated Services Act violated the First Amendment of the Federal Constitution. Nothing was done in that case with respect to moving it forward to final determination. I believe it fair to say that the plaintiffs did not press those cases because of the fact that there were several cases working their way up to the Supreme Court of the United States from Pennsylvania and from Rhode Island and these cases ultimately were decided in 1971.

It is the Lemon against Kurtzman case, the first case; another case was Tilton involving the Connecticut statute providing building funds, but there was a period of time when the plaintiffs in the Mandated Services Act, for their own reasons, decided they were not going to press on. They did not seek a temporary injunction or preliminary injunction when they brought the suit. The case remained in a pretty much state of dormancy after it was filed in July of 1970.

In the Spring of 1971 the State made payments for the 1970-'71 school year. In January of 1972 the State made payment for one-half of the '71-'72 school year. What we are talking about here is that latter half-year payment. Now, after the State made its payment of the first portion of the '71-'72 school year the plaintiffs in the Spring of

1972 then moved for a preliminary injunction and this was argued before a Three-Judge District Court in the United States District Court for the Southern District of New York on April 11, 1972. At that time, after argument, Judge Hays, who was the Presiding Judge, granted a stay pending the determination of the motion, stay against any further payments and the decision came down on April 27, 1972, in which the Three-Judge Court by a two to one margin, with Judge Palmieri dissenting, held the Mandated Services Act to be a violation of the First Amendment. Judgment was entered on that decision on June 1, 1972. The case was, thereafter, appealed to the United States Supreme Court and it was argued in that Court in the Spring of 1973. A decision came down, I believe, the latter part of June of this year affirming that decision by an eight to one margin with Justice White dissenting, but with a, what I believe, is a fairly clear indication that the Court was not condemning the Mandated Services concept, as such. It was simply saying that certain expenses, such as the expense of administering certain types of tests might be intertwined with religious influences and, thereafter, the statute as drawn could not be upheld. I believe it fair to say that the Court did indicate that a more narrowly drawn statute, which limited itself perhaps to the cost of administering regent examinations or other specifically mandated examinations, the cost of maintaining health records, the cost of maintaining attendance records and things like that, might very well pass constitutional muster.

Now, what has happened here, as indicated in the affidavit of Father O'Brien in support of the motion for the summary judgment, is that these schools—many, many schools,

not just Cathedral Academy, many schools—relied upon the expectation of receiving these appropriated funds and because of vagaries of litigation, if you will, it was not until the middle of the Spring Semester when the Three-Judge District Court came down with its decision. It was not until June 1, '72 that the injunction was entered. So that what we have is a situation where these schools, relying upon a statute passed by the legislature, as to which they had received in the past year Mandated Services Funds, they had budgeted, made their plans on this basis and in the middle of the Spring Semester the statute is declared to be unconstitutional by the District Court, subject to appeal. At that point the schools were committed in terms of funds. There is no realistic way by which they could cut back at that point and what we are asking here is that the provisions of Chapter 996, which seek to provide an equitable remedy—I believe the statute talks about the fact that the schools have relied upon representations that they were going to receive these funds—it would be only fair and equitable that they are not deprived of these funds. I think that provisions of Chapter 996 should be applied here. I don't think there is any issue of fact that has been raised by the Attorney General. I think it is basically a legal issue.

Now, there is a case which is cited in our brief, which is referred to as Lemon against Kurtzman II, which I think is very, very pertinent to this situation.

If I may briefly recount what happened in that case?

Pennsylvania adopted a statute, which provided a means by which the Pennsylvania Legislature sought to pay a portion of the salaries of teachers in non-public schools

with respect to the teaching of secular subjects. This statute was challenged in Pennsylvania in the Federal Court and the Federal Court dismissed the complaint, upholding the statute. Thereafter, the Supreme Court by a split vote and noting in that case, as I believe it noted in the Mandated Services case or one of the other decisions that came down, that we can only dimly perceive the boundaries of this extraordinary First Amendment problem. The Supreme Court by a split vote reversed and held the Pennsylvania Statute unconstitutional. It went back to the District Court and the District Court entered a judgment enjoining any further payments, but allowing payments to be made for the school year, which had just closed. I think the Supreme Court decision came down the end of June and the District Court allowed payment for the year or half-year that preceded since the schools expended the money in reliance upon the assumption that the statute was valid. The case went back up to the Supreme Court and the Supreme Court, in a decision which we have attached to our brief, held that where you have a situation of a statute that—as to which there is a reasonable constitutional question, that where there is reliance upon the statute in terms of expenditures of money, and so forth, that the declaration of unconstitutionality will not apply retroactively and while payments cannot be made for future services, payments can be made for services rendered during the period of the prior time when the persons involved have relied upon the actions of the legislature, relied upon the actions of the Courts.

Now, in this case, in Mandated Services, we have a case where the constitutional issues were by no means clear.

We have the fact that in the District Court, Three-Judge District Court, consisting of Judge Hays of the United States Court of Appeals and two District Court Judges, there was a split. There was a dissenting opinion by Judge Edmund Palmieri. The case then was appealed to the United States Supreme Court and under the Court's procedure, there is a procedure for a motion by the appellee, the respondent, to dismiss the appeal for want of a substantial Federal question. Now, if the Supreme Court feels that the decision was right and presents no important constitutional questions, the practice is to affirm summarily and dismiss the appeal for want of a Federal question as opposed to allowing the case to proceed on for full brief and argument. The Supreme Court denied a motion by the plaintiffs-appellees in Mandated Services to dismiss for want of a substantial Federal question; set the case down for full argument. It was argued. As I said before, there was a split in the Court with Justice White dissenting. I think it fair to say that even the majority would not hold the concept of Mandated Services—reimbursement for Mandated Services to be unconstitutional. What they were objecting to, I think, was the inclusion of certain types of services, which went beyond the attendance records and health records. I think that the case that we have here was quite similar to Lemon II. We have the situation here where the first determination of unconstitutionality came at the end of April; the judgment was entered June 1st and by that time, for all practical purposes, the school year had progressed to the point where no important financial changes could be made in the schools' operations. The schools had depended on Mandated Services. The legislature had sought to provide it to them by a vagary of litigation. This was cut off in the middle of the school year. Chapter 996 was enacted for the specific purpose of remedying this inequitable situation. I think under Chapter 996 and under the specific precedent of the second Lemon case, I think that summary judgment is warranted here.

Thank you very much.

THE COURT: Mr. Connolly.

MR. CONNOLLY: Thank you, Your Honor.

Before I begin, on Page 4 of my brief, the last sentence says "The claim was filed on September 9, 1972." That is an incorrect date. The date should be September 6th. So there is no misunderstanding, we have not raised any statute of limitations argument. Then on the last page, in the conclusion, the word "claimant" should be "defendant". I apologize. I wrote this brief hurriedly yesterday and I apologize to the Court and counsel for any inconvenience.

We have asked that summary judgment be granted to the State dismissing the claim and we have raised two grounds, the first of which is that the Enabling Act itself is unconstitutional and I briefed that point and I will not get into it at this time. I would like to, instead, pass on to discussion of the case of Lemon against Kurtzman because, frankly, I think that case would be rather dispositive of the issues in this particular case. I think to fully understand the import of that, it is—first it is necessary to lay out a chronology of events.

First of all, in the Lemon case—in the Lemon case the statute—Pennsylvania statute became a law in June of 1968. The action was commenced a year later, in June of

1969, and at that time the State had entered into contracts with school districts and the contracts were implemented and payments were being made. On November 29, 1969 the Three-Judge District Court in Pennsylvania granted the motion to dismiss the complaint. In April of 1970 the Supreme Court noted probable jurisdiction and in September of '70 the schools began rendering services for the 1970-'71 school year and January of '71 the same schools entered into contracts with the State to provide services for that school year and in June of '71 the Supreme Court declared the statute to be unconstitutional and they remanded it back to the District Court. What is important to note, I believe, is at that point the contracts themselves were entered into and the services were performed after the District Court had declared the act to be unconstitutional and dismissed the claim. That is a different situation than what we are faced with here and the basic distinction between the two cases, I believe, as it is found in the decision of the Court itself, the Supreme Court, is that the Pennsylvania statute provided that when the services were being rendered in order to insure that the money was being used for non-religious purposes, there was an elaborate audit procedure set up whereby the State Auditor General had to audit financing of the schools to insure that the money was going for strictly secular purposes. The Supreme Court took exception to this setup and, in effect, said by doing this, by requiring this auditing the State of Pennsylvania was involved in excessive entanglement in religion and they struck the statute down. On remand the District Court did allow payment to be made for the balance of the 1970-'71 school

year, but what the District Court held and what the Supreme Court held was that they took exception to the fact that there was an elaborate auditing procedure established, which got the State involved in excessive entanglement with religion. Since they had enjoined any further operation of the statute, since the auditing, which they took exception to, was completed there was no further excessive entanglement. There could be no further entanglement. The unconstitutional practice itself had ceased and, therefore, there was no harm in making the final payment and no violence would be done to the decision that they previously rendered.

The Supreme Court in affirming in Lemon II said, at Pages 201 and 202, " . . . Act 109 required the Superintendent of Public Instruction to ensure that educational services to be reimbursed by the State were kept free of religious influences. Under the Act, the Superintendent's supervisory task was to have been completed long ago, during the 1970-1971 school year itself; nothing in the record suggests that the Superintendent did not faithfully execute his duties according to law. Hence, payment of the present undisputed sums will compel no further oversight of the instructional processes of sectarian schools."

In the Levitt case what the Court took exception to was not that the New York statute involved excessive entanglement. They took exception to the fact that there was no provision in the New York statute to supervise how the money was spent and there was no way of determining where the money went, whether for secular purposes or religious purposes, and that is what the Court excepted to and it was on that ground that the Court declared the

statute unconstitutional. In dismissing or in throwing the statute out the Supreme Court held—it is on the last page of the Court's decision—"We hold that the lump sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. This is a legislative, not a judicial function."

They are back in here asking that this Court authorize payment of exactly the same items that the Supreme Court said couldn't be paid and this statute is an attempt to do indirectly what couldn't be done directly. If the intent was originally made to provide payment under the Mandated Services Act the Supreme Court said you can't pay. We are back in here to pay the same amount not under the Mandated Services Act, but under the Enabling Act, but it was for the same purposes the United States Supreme Court said could not be reimbursed.

There is another distinction which I draw between the—this case and the Lemon against Kurtzman case. In Lemon II, at Page 206, the United States Supreme Court said: "It is argued though, that the schools were foolhardy to rely on any reimbursement by the State whatever, in view of the constitutional cloud over the Pennsylvania program from the outset. We conclude, however, that our holding in Lemon I decided an issue of first impression whose resolution was not clearly foreshadowed."

My point on that is this: That Lemon I was decided in June of 1971. The payment which the Claimant is seeking to be paid here is for services allegedly rendered in the Spring of 1972 and I think there is such a close parallel between the Pennsylvania statute and between the Mandated Services Act; both provided, basically, for the same payment by different methods; that it was no longer an issue of first impression existent and the resolution of this issue was clearly foreshadowed at that point with the decision of the United States Supreme Court in the Lemon I case and I think that is a basic distinction also in that. In view of that I think it was fairly obvious as to what the ultimate resolution of the case was going to be when it got to the United States Supreme Court.

I won't argue the constitutional issues that I raised with regard to the Enabling Act itself. I set that forth at length in my brief and, frankly, I don't think there is a need to belabor that argument. If counsel would like an opportunity to respond to that point in a reply brief, I have no objection, Your Honor. I make an oral cross-motion for summary judgment on behalf of the State and I ask the claim be dismissed.

Thank you, Your Honor.

Mr. Nolan: May I make one or two observations?

THE COURT: You may.

MR. NOLAN: I would like to file a very short reply. We received the State's brief yesterday afternoon and Mr. Connolly was very courteous in getting it to us, but I didn't have a chance to see this until I got up here this morning. I would like an opportunity to reply to it.

THE COURT: I appreciate the situation and I am extending to you that privilege of filing a reply brief. How much time do you need?

MR. NOLAN: I would think if I could have a week—

THE COURT: You have a week.

MR. NOLAN: Let me just make one or two points briefly. The Attorney General indicated that he felt that the decision in the first Lemon case involving a Pennsylvania teacher supplement statute forecast the result of the Mandated Services Act. I don't think that is so for several reasons. As I indicated, if the decision in Mandated was forecast, clearly forecast by the decision in the first Lemon case, the Supreme Court under its practice should have granted the motion to dismiss the appeal. Instead it noted probable jurisdiction, which is its way of taking the case on for full argument and heard full argument.

In addition, I must say if the Attorney General felt that the decision was forecast by the first Lemon case, nobody told Mrs. Coon about it, the Deputy Solicitor General, because she was in there fighting as hard as she could in briefs and oral argument to maintain the constitutionality of the statute.

As I said before, there was a split in both the District Court and the Supreme Court.

I think we are dealing here with a very, very complex area, almost of shadow and light, with the Supreme Court taking a number of different tacks every time a major church case comes up before it. It is hard to say anything, including the ultimate decision in Mandated Services was at all forecast by what happened before.

Secondly, I would like to point out again that while there are minor chronologic differences between the sequence of events in the second Lemon case and the sequence of events in Mandated Services, I don't think they are really of any substance. The fact of the matter is in the Spring of 1972 the District Court rendered its decision. At that point in time the spring semester was half gone. By the time judgment was entered the spring semester was virtually all gone, June 1st; by that time these schools had, of necessity, had to budget, commit themselves and had expended a very large part of the money. I think in justice and equity the reasoning of the Supreme Court in the second Lemon case was right. I think the reasoning of the legislature in providing Enabling legislation, as contained in Section 996, is right, fair and just and I think the motion for summary judgment ought to be granted.

Thank you very much.

MR. CONNOLLY: I have nothing further, Your Honor.

THE COURT: Gentlemen, as I understand your respective positions—for the Claimant, Mr. Nolan, you base your position in large measure on Lemon II?

MR. NOLAN: I think that's right, yes.

THE COURT: And you base your position, Mr. Connolly, in large measure on Lemon I; is that a fair statement?

MR. CONNOLLY: I think that's correct, Your Honor. I think the basic distinction that we have to make is to go back to why the Court declared the statute in Lemon unconstitutional and why the Court declared the New York State—declared it unconstitutional. I draw that distinction. They put the States in this situation—damned if

you do and damned if you don't situation and the Pennsylvania case, they said if you supervise you are involved in excessive entanglement. In the New York case they said if you don't supervise we don't know if the money is going for religious or secular purposes and that's improper also, they said.

MR. NOLAN: May I say that in Lemon II the Court specifically said—I am quoting from the decision— ". . . State officials and those with whom they deal are entitled to rely on a presumptively valid State statute, enacted in good faith and by no means plainly unlawful."

I think the same thing is true here in Mandated. The fact that the Supreme Court's criticism of the Mandated Services Act dealt with the lack of intensive State auditing, I don't think there is a difference of principle. I think what we are talking about here is not a matter involving whether the Mandated Services Act can continue on in the future and whether there will be any long range church-State problem. We are simply talking about the innate fairness of providing to the non-public schools, which are very, very sorely pressed, as I am sure Your Honor is aware, the money that they paid out in reliance on the presumptive legality of what the New York Legislature has done and in the absence of any ruling by any court that it is unconstitutional and in the atmosphere of a situation where the only final judgment in this church-State area comes from the Supreme Court. My experience has always been it is almost a new ball game every time you get up in the Supreme Court.

THE COURT: Mr. Nolan, you seem to presume the constitutionality of Chapter 996.

MR. NOLAN: I am talking about—principally about the constitutionality, the presumptive constitutionality of the Mandated Services Act. I have not addressed myself to the—

THE COURT: In your brief and in your oral argument today you rather seem to assume the constitutionality of Chapter 996.

MR. NOLAN: I think the State—

THE COURT: And I would request from both of you gentlemen that you argue that matter with each other and with the Court at this time.

MR. NOLAN: All right. Your Honor, the State has made an argument that Chapter 996 is invalid under New York Law, the New York Constitution, as I understand it, because there is—I am phrasing this in a very rough manner —there is no consideration for the granting of such funds. This does not come, the State contends, within the types of statutes in which the State has allowed the Court of Claims to grant money judgment, such as tort claims and so forth. I think that from our standpoint what the State recognized here was that the private non-public schools have in the past been conferring a benefit upon the State in terms of the fact that the State, in order to effectuate compliance with the Education Law, which requires education in certain types of subjects, requires the keeping of certain records in both non-public and public schools, ultimately requires that any education that is given in a non-public school be substantially equivalent in secular subjects to the education that is given in the public schools, so that the net results of a student's eight years in elementary school will be a diploma that is recognized as a

diploma of the State of New York, whether he or she attends a non-public or a public school. The idea I think is to make sure that the non-public schools maintain quality education in the secular area. Now, when the State mandates certain requirements, such as keeping of attendance records to make sure that the children are going to school; the keeping of health records; the providing of examinations to make sure that the children's proficiency in educational subjects is tested on a regular basis; when they do that I think the State felt, in the original Mandated Services Act, that it was only fair to provide some State responsibility for this. Now, when that statute was declared unconstitutional the State was presented with a situation where relying upon the legislature's representations, if you will, the schools had gone ahead and expended money that it was only fair and just and, in accordance with a decent recognition of the past contribution of these schools, that Chapter 996 be adopted. I think 996, I really do not believe—and I want to check out the cases that have been cited out by the Attorney General—but in reading the quotes here I don't see anything there that says that this is a violation of the New York State constitution. I think so far as the Federal constitution is concerned that this is covered by Lemon II and that, again, the case really comes down to a determination of the applicability of Lemon II.

I would like, as I said before, to file a reply brief, which would meet the contentions made by the Attorney General in point one of his brief in the claim of unconstitutionality of Chapter 996 under the New York Statute, but it seems to me that this is something that is within the legislature's broad purview of power to meet a situation, a pressing situation and to handle that in a way deemed to be in the public interest. The only question I would see here would be whether in so doing the Statute violated the First Amendment and I think that is answered by the Supreme Court of the United States in Lemon II.

THE COURT: Mr. Connolly?

MR. CONNOLLY: Basically, Your Honor, in this Enabling Act, moral obligation situation, there are two categories of cases in which valid Enabling Acts can be enacted. Those in which there has been an unjust enrichment of the State and those in which the Claimant was injured by some act of the State. Frankly, in this situation if there was or were not reliance on the part of the Claimant, the non-payment was not by an act of the State. It was by an act of the United States Supreme Court. It is not something where we willfully reneged. It was a situation where the State was told you cannot pay and in this situation one of the leading cases in the area is Williamsburg Savings Bank against State. The case is cited in my brief at 243 N.Y. 231, 241. The Court of Appeals said: "The decision by the Legislature that certain facts create a moral obligation, even if those facts exist, is not conclusive. The courts will still be called upon to decide whether its judgment was correct. And lastly it is incumbent upon the Legislature to avoid violation of the constitutional prohibition of audit or allowance by it of a private claim, and the final duty of awarding or adjudging payment must be performed by some appropriate body after consideration of the facts and law with full power to reject as well as to award."

I submit that what the legislature has done in this instance is to audit a private claim. The Mandated Services Act, the State was told you cannot pay because you do not know if the money is being spent for secular or religious purposes and by allowing the claims to be filed in exactly the same amounts that would have been paid under the Mandated Services Act, the legislature has, in effect, audited these claims and held that they are to be paid by this court. I think all the cases, in effect, hold that there are some—some scintilla of a legal claim against the State, which for various reasons cannot be perfected; either there is not a forum available or the State has not waived its liability in a certain area and those are the items or the areas in which moral obligation acts have been held to be proper and that is not what we have in this situation. There is underlying this no legal claim; strictly an equitable type argument; equitable statute. And going back to the decision in Lemon II, the Supreme Court clearly held that it was considering an equitable decree from the trial court and its jurisdiction on review was rather limited and I just remind the Court in that situation that this Court is a Court of limited jurisdiction with very limited equitable powers and refer the Court to the case of Psaty against Duryea 306 N.Y., Page 413; Benz against the Thruway Authority 9 N.Y. 2d Page 486; Easley against the Thruway Authority 1 N.Y. 2d Page 374. Those cases have all held that this Court is a Court of very limited jurisdiction. It has equitable limited—limited equitable powers only in very narrow situations and that it is very possible that situations where someone has an equitable claim against the State, they are absolutely deprived of a remedy because there is no forum open to them to hear that situation.

Thank you, Your Honor.

THE COURT: Inherent in the motion for summary judgment—and before me this morning are motions for summary judgment, one brought by the Claimant and one brought by the State—is the assumption or the position that there is no triable issue of fact. Do I understand, Mr. Nolan, that that is your position?

MR. NOLAN: I believe so.

THE COURT: That there is no triable issue of fact?

MR. NOLAN: I believe so. I believe there is a claim, of course, and an affidavit by Father O'Brien, who was head of Cathedral Academy. I don't think there is any triable issue of fact and the State has raised none.

THE COURT: And do I understand, Mr. Connolly, that you take that position, having moved for summary judgment, that there is no triable issue of fact?

MR. CONNOLLY: Yes, Your Honor. I think the motion of this type in this case is appropriate.

THE COURT: In other words, you concede that there was reliance on the part of the Claimant in this matter?

MR. CONNOLLY: I think that would get into the damage question, Your Honor, rather than the question of whether the statute is proper. I think this Court could grant summary judgment to either party and if it were granted to Claimant, I think we would probably have a trial on the damage issue on how much and I think at that time it would be proper to take evidence as to whether or not there was reliance and very possibly at that time it would be necessary to introduce evidence to show how the money

was spent, so that to prove it was not spent for religious purposes. I think the reliance gets into the question of damages rather than the question of whether the statute is proper on its face.

THE COURT: Rather than the applicability of Chapter 996 to the facts of this case, other than damages?

MR. CONNOLLY: I still think that goes to the damages, Your Honor, rather than—

THE COURT: Well, you moved for summary judgment asking dismissal of the claim.

MR. CONNOLLY: Yes.

THE COURT: Inherent in that motion is the assumption of a position by you—I think we can all agree as practicing attorneys to this, that there—the position that there is no triable issue of fact for the Court to determine. Is that a fair statement of the law, procedure motion for summary judgment?

MR. CONNOLLY: Yes, I would agree to that, Your Honor.

THE COURT: So my question to you is: Do you concede that there was reliance on the part of the Claimant to Chapter 996?

MR. CONNOLLY: In reading the claim, Judge, there is no allegation that there was reliance.

THE COURT: Well, the Claimant is arguing reliance, as I understand it.

Is that so, Mr. Nolan?

MR. NOLAN: Yes, Your Honor, and Paragraphs 5 and 6 of Father O'Brien's affidavit is in support of the motion for summary judgment. I don't have the claim before me at the moment, but in the affidavit it says, according to Paragraph 5: "Claimant duly applied and was reimbursed

by the State for the costs it incurred in providing the above services mandated by law for the school year 1970-'71.

"Claimant budgeted for, and relied on eventual receipt of, similar reimbursement pursuant to Chapter 138 for the school year 1971-'72."

So I think we certainly do feel that the school relied on it and it seems to me that there is no real issue, I wouldn't think, about that. So far as any question of damages—

THE COURT: That is what I am endeavoring to clarify, whether we do have an issue—

MR. NOLAN: I don't think so.

THE COURT: —on the matter of reliance?

MR. NOLAN: The State has not controverted in any way the factual affidavit of Father O'Brien as to the amount. The State Education Department proffered and paid the first portion, which was exactly the same amount. In other words, the first portion of the '71-'72 amount was paid prior to the District Court's decision and that was in the exact amount of $7,347.28 and this is simply the other half. As to the reliance, we certainly claim it. It has not been controverted and I do not see any issue of fact here. It is a legal issue.

THE COURT: I understand your position now, Mr. Nolan, and in the claim it is stated that the claim was brought on Chapter 996.

MR. NOLAN: That's right.

THE COURT: The affidavit by Father O'Brien does allege reliance.

MR. NOLAN: That's right, sir.

THE COURT: What I am endeavoring to ascertain is whether or not we have an issue of fact to be determined with regard to reliance and, as I understand your position, Mr. Connolly, it is that a matter of reliance, not a matter of reliance, it is a matter to be concerned about insofar as the damages are concerned. Is that the position you are taking?

MR. CONNOLLY: Yes, it is, Judge.

THE COURT: Only as to damages?

MR. CONNOLLY: I am sorry to hedge on it, Judge.

THE COURT: That is all right, Mr. Connolly; take your time, but, once again, the Court has two motions for summary judgment before it and I am just trying to clarify as to whether we do have an issue of fact here, which should be tried. Again, inherent, as we all know, in a motion for summary judgment is the assumption or position that there is no triable issue of fact. You have made such a motion.

MR. CONNOLLY: Yes.

THE COURT: As has the Claimant, who has stated that there is no triable issue of fact and a certain reliance. You appear not to want to concede reliance totally for all purposes. Can you clarify for the Court a little bit better just what your position is?

MR. CONNOLLY: Basically, that the Enabling Act itself is unconstitutional without getting into the reliance issue. It is the statute itself that we are addressing our motion for summary judgment. We have not raised the issue of reliance and it does not come or arise in our papers or anything that we submitted to the Court.

THE COURT: It does if you are right in your position that 996 is unconstitutional; only if that be the determination.

MR. CONNOLLY: Well, that's the basis of my motion, Judge. I don't want to, and I apologize to the Court, I don't want to stipulate that point away at this time. When I say "that point," I don't want to stipulate on the reliance issue at this time, Judge. I would be stipulating to a set of facts which, frankly, I don't have the authority to stipulate to, one of my reservations, but I think on our position on the cross-motion for a summary judgment dismissing the claim, our position is based on the face of the statute and I don't think reliance becomes a question.

THE COURT: Do you have anything further, Mr. Nolan?

MR. NOLAN: No, Your Honor, except it seems to me that if by making a cross-motion for summary judgment the State is saying that there is no triable issue of fact, just as when we make a motion on behalf of Catholic Cathedral for summary judgment, we are telling Your Honor there is no triable issue of fact and it seems to me it is perfectly apparent from the circumstances of this whether or not the statute is—996 is or is not constitutional is perfectly apparent that these schools relied and the legislature so found.

THE COURT: Anything further, Mr. Connolly?

MR. CONNOLLY: I am bothered by the question Your Honor has raised on reliance. If that is going to become a issue, I will withdraw my motion for summary judgment and, frankly, take the position that the Claimants in all fourteen hundred claims that have been filed are required to put in testimony and evidence to show reliance. The fact

that the legislature said there was reliance does not foreclose this Court from looking at that issue and that's why I don't want to stipulate to it and, frankly, if Claimants are taking that position, they are supporting my position that the Enabling Act is unconstitutional and I just can't concede that point and if it does become an issue then I will withdraw my cross-motion and ask that the Claimant's motion be denied. We have triable issues of fact, if that is the problem.

MR. NOLAN: It seems to me that we have an affidavit in here by Father O'Brien saying that the school relied on it. It seems to me that the State—the State has had this affidavit since November 20th, or thereabouts. If they had any question about it they could have controverted it. They haven't. In fact, the question of reliance I thought had been resolved and everybody was approaching this thing from the standpoint of a legal issue and I think that is the way to do it. I think not only from Father O'Brien's affidavit, but just inherent in the entire sequence of events here, it seems to me it would be almost incredible that the schools did not rely in budgeting on these matters. Now, it seems to me it would be awfully wasteful because there are other claims that are similar to this, it would be awfully wasteful to require proof of this. It seems to me what we have here is a situation involving the question of whether Chapter 996 is constitutional under the New York Constitution; is it constitutional under the Federal Constitution in the light of Lemon II and any other pertinent decisions and the amount in controversy, I don't think can seriously be disputed by the State because it is the exact amount the State Education Department said was correct in the Spring

of 1971, but what I think we all would like here, on this side of the table, is to move this matter along so we know where we stand.

MR. CONNOLLY: I have the same feeling, Judge, that, frankly, the basis of my cross-motion was, I think it is a threshold question that this Court has to decide and that is whether or not the Enabling Act violates the New York Constitution and the United States Constitution and I really don't think that reliance becomes a question when addressing ourselves to that threshold determination and that is why the issue never came up, nor discussed. I had many discussions with Mr. Sanderson and Mr. Aquilino and we approached this from the standpoint that this would be a—that there are strictly legal issues and I still feel that way. I think that's a threshold determination that has to be made before we can move on to the next question.

MR. NOLAN: Well, it seems to me that we have filed a motion for summary judgment in which we have made an allegation of reliance; that allegation has not been controverted by any evidence and the State has had an opportunity to obtain such evidence and to me it just seems virtually incomprehensible that the State would take the position that there was not reliance on the situation.

Now, whether Chapter 996 is constitutional or not constitutional is one thing, but it seems to me that we are moving for summary judgment on a claim in which, as a factual matter, we have alleged reliance on the legislature's action. There has been no controverted—no contravention of that allegation. It seems to me that there is no realistic issue here of a factual nature. I think this is really a question of: Is the Chapter constitutional? If so, it seems

to me that the results flow from that. If it is not constitutional there are results that flow from that.

Thank you.

MR. CONNOLLY: I have nothing further.

THE COURT: So that the record may be clear, I think I should inquire of you, Mr. Connolly, in view of your statement of a few moments ago that if the Claimant asserts the position, that you might withdraw your motion for summary judgment on behalf of the State, are you doing that or are you pursuing your motion? I don't want to put you in the position of making the decision instantly. Do you wish to take the position that you will pursue the motion and in that case withdraw it at some other time before the Court makes a decision?

MR. CONNOLLY: I would take the position—at that point I would like to pursue my cross-motion upon the ground that the claim itself has been filed pursuant to an unconstitutional statute. Once the Court decides the question of whether or not the Enabling Act is constitutional, I think, as Mr. Nolan said, obvious results flow from there.

THE COURT: Is there anything else to come before the Court at this time, Gentlemen?

MR. NOLAN: No.

MR. CONNOLLY: No.

THE COURT: All right. Decision is reserved. Court is adjourned.

I, Gilbert Schlamowitz Official Court Reporter of the Court of Claims, do hereby certify that I attended at the time and place above mentioned and took a stenographic record of the proceedings and testimony in the above entitled claim, and that the foregoing is a true and correct copy of the same and the whole thereof, according to the best of my ability.

/s/ GILBERT SCHLAMOWITZ, C.S.R.

Dated June 10, 1974

OPINION OF THE NEW YORK COURT OF CLAIMS.

COURT OF CLAIMS
STATE OF NEW YORK

Claim No. 56557

Motion No. M-15976

CATHEDRAL ACADEMY,

Claimant,

—against—

THE STATE OF NEW YORK,

Defendant.

Before:

HONORABLE WILLIAM L. FORD,
Judge of the Court of Claims.

Appearances:

For the Claimant:

DAVIS, POLK & WARDWELL, Esqs.,

By: RICHARD E. NOLAN, Esq.,
and
THOMAS J. AQUILINO, JR., Esq.,
of Counsel.

For the State:

HONORABLE LOUIS J. LEFKOWITZ,
Attorney General.

By: KENNETH J. CONNOLLY,
Assistant Attorney General.

By notice of motion claimant seeks summary judgment on its claim, filed pursuant to Chapter 996 of the Laws of New York 1972°, in the amount of $7,347.29 as the balance alleged to be due and payable as reimbursement for funds expended by claimant as set forth in said Chapter and which had been provided by Chapter 138 of the Laws of New York 1970**, for certain school related services, described in both Chapters,[1] rendered in the second half of the 1971-1972 school year.

The defendant did not file an answering affidavit to claimant's motion. In its memorandum of law, filed prior to oral argument of the motion, and during the argument, it opposed claimant's motion and cross-moved for summary judgment dismissing the claim on the grounds that Chapter 996 is unconstitutional and that the decision of the United States Supreme Court in *Levitt v. Committee for Public Education and Religious Liberty*, 413 US 472 [June 25, 1973] requires dismissal. Subsequent to the argument, defendant requested, by letter to the Court, that its cross-motion be treated as a motion to dismiss rather than as a motion for summary judgment. The claimant, by letter to

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° Copy of Ch. 996 of the Laws of New York 1972 attached as Appendix A.

** Copy of Ch. 138 of the Laws of New York 1970 attached as Appendix B.

[1] The school related services described in Chapters 138 and 996 included examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the State of various other reports as provided for or required by law or regulation.

the Court, stated that it had no objection to the request and the Court, therefore, considers the defendant's motion as one for dismissal of the claim.

Both parties came to court originally with motions for summary judgment, and there has been no evidentiary hearing requested or held. The only sworn statements are contained in the affidavit attached to claimant's notice of motion. The Court, therefore, finds that there is no factual issue herein.

The claimant contends, the defendant does not dispute, and the Court finds that claimant was one of the schools included within the provisions of Chapter 138 and in accordance therewith made application for reimbursement for services rendered in the school year 1970-1971 and was reimbursed by the State for that school year in two equal payments; that claimant budgeted for, relied upon and filed a similar application on or about November 5, 1971 for reimbursement for the school year 1971-1972 and the State reimbursed the claimant in January of 1972 for the first semester; and that the claimant rendered the required services for the remaining semester of the 1971-1972 school year and has not been reimbursed therefor.

The Court further finds as undisputed that on September 6, 1972 the claimant timely filed its claim with this Court pursuant to Chapter 996 which was approved and became effective on June 8, 1972; that this claim has not been assigned or submitted to any other court or tribunal for audit or determination and that Chapter 996 conferred jurisdiction upon this Court to hear, audit and determine the claim or claims of nonprofit schools, other than public schools, against the State for reimbursement of the funds expended

by them in rendering certain school related services under Chapter 138, commonly known as the Mandated Services Act, which Act became law on April 18, 1970, effective on September 1, 1970, though its applicability related back to July 1, 1970, and which Act was held unconstitutional by a three-judge United States District Court, Southern District of New York in *Committee for Public Education and Relig. Lib.* v. *Levitt*, 342 F. Supp. 439, decided April 27, 1972, one judge dissenting, and was affirmed with opinion by the United States Supreme Court in *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 US 472 [June 25, 1973].

The claimant contends, in moving for summary judgment, that, as a matter of State law and equity, the legislature in enacting Chapter 996 on June 8, 1972, has properly and legally recognized that, upon the factual situation here present, the State was morally obligated to establish a procedure by which claimant could be reimbursed and to confer jurisdiction upon this Court to hear, audit and determine the claim or claims of claimant and other nonprofit schools located in the State, other than public schools, against the State for reimbursement of the funds expended by them in rendering services for examination and inspection in connnection with certain school related services as described in Chapters 138 and 996.

Claimant argues that Chapter 996 is constitutional in all respects and that the situation in which it finds itself and which morally obligates the State to reimburse it, consists substantially of the following facts: that the State, by Chapter 138, represented and promised to claimant, and others similarly situated, that they would be reimbursed

for expenses incurred after July 1, 1970 in rendering the services mandated by said Chapter 138; that the State knew that claimant and said schools were relying on said representation; that said representation was an effective cause of said expenses by claimant and other schools; that appropriations, known to claimant, were made to the Education Department to enable that Department to reimburse such schools for the rendering of such services; that based on the representation of the State that reimbursement would be made for such services, such schools already in fiscal crisis, by budgetary allocations and other methods, made available the necessary personnel to perform such services; that Federal courts, by various orders, enjoined payments to such schools and as a result, reimbursement for the full period July 1, 1971 to June 30, 1972 has not been made to claimant and such schools, although all such services were duly performed; that claimant and such schools during such period did incur expenses in rendering the mandated services in reliance upon such representation of reimbursement; and that the legislature has indeed recognized a moral obligation resting upon the State to provide, as it has attempted to do, a remedy whereby such schools may recover the complete amount of expenses incurred by them prior to June 30, 1972 in reliance on the said representation. Claimant argues further that not only do the foregoing facts exist but also that the State legislature in the very language of Chapter 996 admits all of them and states, upon said facts, its own conclusions that a moral obligation to reimburse exists and that said claim or claims are founded in right and justice, or in law or equity.

Any issues of Federal law and equity, claimant contends, in effect, have been decided already in its favor in *Lemon*

v. *Kurtzman*, 403 US 602 [1971, *Lemon I*] and 411 US 192 [1973, *Lemon II*]. It argues that in *Lemon II* as in *Levitt*, supra, a group of taxpayers sought to thwart the legislative will through the filing of federal suits, without pursuing or obtaining preliminary injunction, thus allowing the legislative enactments to become and remain effective and allowing the states and the nonpublic schools to rely on such enactments; that in both cases, the constitutionality of the respective statutes was determined finally only after full review by the Supreme Court; that in both cases, judgment of unconstitutionality was made at or near the end of the school year; that in both cases, the nonpublic schools and the states had relied, in good faith, on the respective statutes and the nonpublic schools had incurred substantial financial obligations pursuant thereto during the time the federal actions were pending. Thus, claimant argues, to the extent that federal constitutional issues relate to its motion, *Lemon II* is controlling and supports its claim.

The defendant contends that Chapter 996 is unconstitutional in that, at the outset, the State legislature lacked the constitutional power to enact Chapter 996 authorizing this claim.

The defendant further contends that some act on the part of the State creating a moral obligation to reimburse is lacking in the instant claim and is necessary as a matter of law in order to overcome the constitutional prohibitions of (a) auditing of private claims by the legislature (Article III, §19, State Constitution) or (b) making gifts of State money (Article VII, §8, State Constitution).

In support of its contention the defendant argues that a moral obligation, such as to validate enabling acts, is

created only in those cases in which there has been an unjust enrichment of the State by virtue of benefits conferred upon it by private persons and, secondly, in those cases in which the claimant is injured by some act of the State or its officers and agents.

The defendant's position is that, in the instant case, there has been no benefit to or unjust enrichment of the State, nor has there been any injury or damage inflicted by anyone in the State's service. In fact, says defendant, the enabling act itself clearly demonstrates in Section 2(a) that prior to July 1, 1970 claimant was performing, at its own expense, the same services for which it now seeks reimbursement and that, therefore, any claim that these services were performed on representations of the State clearly is without merit and, in any case, it had no right to so rely.

Additionally, the defendant argues that since Chapter 138 provides no procedure to insure that State funds are not used for religious purposes, this Court cannot determine whether the amount claimed is subject to constitutional objections and, therefore, in purporting to allow claimant to recover the sum of $7,347.29 the legislature is auditing a private claim in contravention of Article III, §19 of the State Constitution.

The defendant urges another objection to the enabling act, namely, that it is an attempt by the legislature to reverse the decisions of the District Court and the United States Supreme Court in *Levitt,* supra, and that this attempt is a clear violation of the constitutional doctrine of separation of powers, being an invasion of the powers of the judiciary by the legislature.

Lastly, the defendant contends that the decision of the Supreme Court in *Levitt* v. *Committee for Public Education and Religious Liberty,* 413 US 472, requires dismissal of this claim and defendant reinforces this contention by arguing that the decisions of the Supreme Court in *Lemon* v. *Kurtzman,* 403 US 602 [June 28, 1971, *Lemon I*] and 411 US 192 [April 2, 1973, *Lemon II*] relied on by claimant, are distinguishable from *Levitt,* supra, and, in fact, actually support the defendant's position.

In deciding these motions, attention should first be directed, in the Court's view, to the critical question of whether or not, assuming arguendo that Chapter 996 was constitutionally enacted, the implementation thereof by this Court would be constitutionally permissible. If the answer to this question be in the negative, there is no purpose in the Court's determining whether the facts, upon which this claim authorized by Chapter 996 arose and which the Court has found are as the legislature has determined them to be, constitute a predicate for a moral obligation on the State's part which is essential for the creation of a valid claim.

The Court is of the opinion that it must answer its question in the negative and it therefore holds that the implementation of Chapter 996, in the form of an award of a payment to the claimant, would be constitutionally impermissible as violative of the Establishment Clause of the First Amendment to the Constitution of the United States and bases its decision upon the holdings made in the majority opinion of Mr. Chief Justice Burger in *Levitt,* supra.

The significant holding therein and discussion is to be found on pages 479, 480:

"As noted previously, Chapter 138 provides for a direct money grant to sectarian schools for performance of various 'services.' Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.

"We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not 'assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment.' *Lemon* v. *Kurtzman,* 403 US, at 618. But the potential for conflict 'inheres in the situation,' and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. See *id.,* at 617, 619. Since the State has failed to do so here, we are left with no choice under *Nyquist* but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities."

Mr. Chief Justice Burger said more on page 482:

"We hold that the lump sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety

of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial function."

Chapter 996 states, among other things, that the base of this claim and others is, in effect, predicated on the nonprofit, nonpublic schools' performance of certain services beneficial to the State and such schools' reliance for reimbursement therefor under Chapter 138. The Supreme Court, in *Levitt,* held that Chapter 138 violated the Establishment Clause. To hold with the claimant would require this Court to implement Chapter 996. This cannot be done because it would have the effect of resurrecting Chapter 138 which the Supreme Court declared unconstitutional.

Despite the holding in *Levitt,* claimant urges that *Lemon II* stands for the proposition that, even though a state statute may have been struck down under the Establishment Clause, nevertheless, when a claimant relies thereon, prior to the finding of unconstitutionality, in performing certain services with the expectation of reimbursement, which is not forthcoming, then, in right, justice, law and equity claimant should be reimbursed. As applied to the facts of the instant claim we disagree because in *Lemon II* the Supreme Court, after remand, found that any payments there allowed "will not be applied for any sectarian purposes" (see pp. 202, 203), whereas in *Levitt* the Court found that "the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities" (see p. 480).

In *Lemon II*, in affirming the judgment of the three-judge District Court of the Eastern District of Pennsylvania entered after remand, Mr. Chief Justice Burger, in an opinion joined in by three other justices, made a specific finding that the State funds there involved would not be applied for any sectarian purposes, stating on pages 202, 203:

"Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding, that interest is implicated only once under special circumstances that will not recur. There is no present risk of significant intrusive administrative entanglement, since only a final post-audit remains and detailed state surveillance of the schools is a thing of the past. At the same time, that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes.[3] Finally, as will appear, even this single

[3] See Lemon I, supra:

"If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would breed only rancor and dissention." 403 US, at 640, 29 L Ed 2d 745 (concurring opinion of Douglas, J.)

"The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence." Id., at 668, 29 L Ed 2d 783 (dissenting opinion of White, J.)

Here, the "insoluable paradox" is avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into our present evaluation of the constitutional interests at stake in the proposed payment.

proposed payment for services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971."

The reimbursement in *Lemon II*, affirmed by the Supreme Court, was found allowable because of the very reason the statute was struck down, i.e., the excessive entanglement by the State of Pennsylvania. Such process of oversight by the State, in the form of auditing, assured that State funds would not be applied for any sectarian purposes. Hence, the Supreme Court reasoned that, even assuming a cognizable constitutional interest in barring any state payments under the Pennsylvania statute, any payments to the schools would not and could not be applied by them in aid of sectarian purposes. That essential assurance is lacking in Chapters 138 and 996.

Neither can we implement, try as we may, Chapter 996 to the extent of allowing, after a trial and the taking of proof, reimbursement to claimant and others similarly situated for monies expended for services rendered which would seem to fall within the ambit of constitutional permissibility, i.e., maintenance of records of pupil enrollment and reporting thereon, maintenance of public health records, recording of personnel qualifications and characteristics and services of a like nature which are purely secular activities. This is so because in *Levitt*, supra, the Supreme Court, as we previously noted, stated (page 482): "Since Chapter 138 provides only for a single per-pupil allotment * * *, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reim-

bursable secular services. That is a legislative, not a judicial function."

Nor does Chapter 996 impose enforceable standards or guidelines which would enable this Court to separate and apportion the single per-pupil allotment among the various allowed purposes. *Wolman* v. *Essex*, 342 F. Supp. 399 [1972], aff'd 409 US 808, reh. den., —— US ——, 37 L Ed 2nd 1045; *McArthur* v. *State of New York*, 43 AD 2d 652 [1973]. Such standards or guidelines are to be established by the legislature, not the courts.

Sympathize as we do with this claimant, and the many others similarly situated, and recognize as we must their great and ongoing contributions to the education of over 800,000 young people in this State, and aware as we are of the serious financial problems directly facing the parochial schools, and indirectly, the public, we are, nevertheless, at the same time, constrained because of the Supreme Court decisions in *Levitt* and *Lemon II*, to deny reimbursement as being unconstitutional.

In *Committee for Public Education and Relig. Lib.* v. *Levitt*, 342 F. Supp. 439 at page 445, we find: "But the First Amendment, which has for two centuries assured the individual's right to worship as he chooses, protected the church from the impositions of the state, and immunized the national community against the ills of religious-political divisiveness, must be our guiding star."

Accordingly, claimant's motion for summary judgment is denied and the defendant's motion for dismissal of this claim is granted.

This decision is not intended to affect any claim or claims which have been filed with the Court pursuant to

Chapter 996 by any nonchurch, nonreligious or nonsectarian nonpublic schools.

Defendant shall submit an order, in accordance with this decision, to be settled on seven days' notice.

Dated: April 2, 1974
Albany, New York

/s/ William L. Ford
Judge of the Court of Claims

Appendix A – Ch. 996 of the Laws of New York 1972 attached to Opinion of the Court of Claims.

Claims Against State—Nonprofit Schools

CHAPTER 996

An Act to confer jurisdiction upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools, other than public schools for expenses incurred in rendering certain mandated services.

Approved and effective June 8, 1972.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

Section 2. In hearing, auditing and determining such claim or claims, the court of claims is hereby authorized to consider, inter alia:

Appendix A – Ch. 996 of the Laws of New York 1972 attached to Opinion of the Court of Claims.

(a) That prior to July first, nineteen hundred seventy, said nonprofit schools, rendered services for examination and inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation;

(b) That by a chapter of the laws of nineteen hundred seventy, it was determined and declared as a matter of legislative finding:

> "That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.
> That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities. That these fundamental objectives are accomplished with respect to public schools in part through the provision by the sate of aid to local school districts to meet such costs.
> And that nonpublic schools of the state are responsible for the education of more than eight hundred fifty thousand pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonable assisting such services."

(c) That in furtherance of said policy, appropriations were made to the education department to enable the department to reimburse such schools for the rendering of such services;

(d) Based on the representation of the State that reimbursement would be made for such services, such schools already in fiscal crisis, by budgetary allocations and other methods made available the necessary personnel to perform such services;

(e) That the federal courts, by various orders enjoined payments to such schools. As a result reimbursement for the full period July first, nineteen hundred seventy-one to June thirtieth, nineteen hundred seventy-two, has not been made to such schools, although all such services were or will be duly performed;

(f) That such schools during such period did incur expenses in providing the mandated services in reliance upon said representation of reimbursement;

(g) That but for this claim or claims complete reimbursement to such schools would not be made and such schools are thus without legal right to recover for said expenses;

(h) That the legislature recognizes a moral obligation to provide a remedy whereby such schools may recover the complete amount of expenses incurred by them prior to June thirtieth, nineteen hundred seventy-two in reliance on the said representation.

Section 3. If the court finds that such claim or claims or any of them were founded in right and justice or in law and equity against the state of New York, and are in right and justice presently payable thereby, the state shall be deemed to have been liable therefor and such claim or claims shall constitute legal and valid claims against the state, and the court may award and render judgments for the claimants as shall be just and equitable, notwithstanding the lapse of time since any such claim or claims or any parts thereof accrued, or the failure to do any act in relation to the presentation of such claims or any of them within the time prescribed by law, but no award shall be made or judgment rendered hereunder against the state unless such claim shall be filed with the court of claims within ninety days

from the passage of this act, nor if such claim, as between citizens of the state, would be barred by lapse of time.

Section 4. This act shall take effect immediately.

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Appendix B – Ch. 138 of the Laws of New York 1970 attached to Opinion of the Court of Claims.

CHAPTER 138

AN ACT to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor

Became a law April 18, 1870, with the approval of the Governor. Passed on message of necessity pursuant to article III, section 14 of the Constitution by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby determined and declared as a matter of legislative finding:

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

Explanation – Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

Appendix B – Ch. 138 of the Laws of New York 1970 attached to Opinion of the Court of Claims.

Section 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

Section 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils who are resident of the state during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of such enrolled pupils during either September, October or November of such school year, as selected by the school, divided by the number of days such school was in session during such month.

2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid required for such base year by virtue of the failure to maintain the required total session shall be made in the apportionment in the subsequent school year.

3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a non-profit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

Section 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

Section 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be

paid between January fifteenth and March fifteenth of such year, and the second to consist of the balance and to be paid between April fifteenth and June fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

Section 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated for such purpose pursuant to regulations promulgated by the commissioner.

Section 7. The sum of twenty-eight million dollars ($28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

Section 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

Section 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

Section 10. This act shall take effect September first, nineteen hundred seventy.

JUDGMENT OF THE NEW YORK COURT OF CLAIMS.

At a Regular Term for Motions of the Court of Claims of the State of New York, held at the Justice Building, Albany, New York, on the 21st day of December, 1973.

[Filed April 22, 1974]

Present:

HONORABLE WILLIAM L. FORD,
Judge of the Court of Claims

[SAME TITLE]

Claimant having moved for summary judgment and the State having cross-moved to dismiss, now

UPON the claim, filed in the office of the Clerk of the Court of Claims on September 6, 1972, the Notice of Motion for Summary Judgment, dated November 20, 1973, the affidavit of Leo P. O'Brien, sworn to November 20, 1973, and upon all the papers and proceedings heretofore had herein, and after hearing Davis, Polk & Wardwell, Esq., by Richard E. Nolan, Esq. and Thomas J. Aquilino, Jr., Esq., of counsel, attorneys for claimant in support of the motion and in opposition to the cross-motion, and Louis J. Lefkowitz, Attorney General of the State of New York, by Kenneth J. Connolly, Esq., of counsel, in opposition to the motion and in support of the cross-motion, and a decision dated April 2, 1974, having been rendered dismissing the claim, it is

ORDERED, that claimant's motion for summary judgment is denied, and it is

FURTHER ORDERED, that the State's cross-motion for dismissal is granted and the claim is hereby dismissed.

Dated: April 22, 1974

WILLIAM L. FORD
/s/ WILLIAM L. FORD
Judge of the Court of Claims

NOTICE OF APPEAL TO APPELLATE DIVISION OF THE NEW YORK SUPREME COURT.

COURT OF CLAIMS
STATE OF NEW YORK

Claim No. 56557

CATHEDRAL ACADEMY,

Claimant,

—against—

THE STATE OF NEW YORK.

SIRS:

PLEASE TAKE NOTICE that the above-named claimant, Cathedral Academy, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Third Department, from a judgment denying claimant's motion for summary judgment, granting the State of New York's motion to dismiss and dismissing the claim in the above matter entered in the office of the Clerk of the Court of Claims on the 22nd day of April, 1974, and this appeal is taken from each and every part of said judgment as well as the whole thereof.

NOTICE OF APPEAL TO APPELLATE DIVISION OF THE NEW YORK SUPREME COURT.

Dated: New York, New York
May 13, 1974

Yours, etc.

DAVIS POLK & WARDWELL
By /s/ RICHARD E. NOLAN
(A Member of the Firm)
Attorneys for Claimant
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 422-3400

To:

CLERK, COURT OF CLAIMS
Justice Building
Empire State Plaza
Albany, New York 12223

HON. LOUIS J. LEFKOWITZ
Attorney General

KENNETH J. CONNOLLY, Esq.
Assistant Attorney General
Justice Building
Empire State Plaza
Albany, New York 12223

OPINIONS IN APPELLATE DIVISION, dated 4-24-75.

[Printed in full in Appendix to Jurisdictional Statement;
Officially reported at 47 AD2d 390, 366 NYS 2d 900.]

ORDER OF THE APPELLATE DIVISION APPEALED FROM.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 10th day of February, 1975.

Present:

HON. J. CLARENCE HERLIHY,
Presiding Justice,

HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. T. PAUL KANE,
HON. JOHN L. LARKIN,
Associate Justices.

CATHEDRAL ACADEMY,
Appellant,

—against—

THE STATE OF NEW YORK,
Respondent.

Claim No. 56557

Cathedral Academy having appealed from an order (denominated a judgment) of the Court of Claims, entered

ORDER OF THE APPELLATE DIVISION APPEALED FROM.

on the 22nd day of April, 1974, in the office of the Clerk of that Court dismissing the claim herein, and said appeal having been presented during the above-stated term of this Court, and having been argued by Richard E. Nolan, Esq., of counsel for appellant, and by Jean M. Coon, of counsel for Louis J. Lefkowitz, Attorney General of the State of New York, counsel for respondent, and, after due deliberation, the Court having rendered a decision on the 24th day of April, 1975, [Justices Herlihy and Larkin dissenting] it is hereby

ORDERED that the order appealed from be and the same hereby is affirmed, without costs.

ENTER:

/s/ JOHN J. O'BRIEN
Clerk

DATED AND ENTERED: May 6, 1975.

A TRUE COPY

/s/ JOHN J. O'BRIEN

Clerk

NOTICE OF APPEAL TO THE NEW YORK COURT OF APPEALS.

SUPREME COURT
STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

No. 24780

CATHEDRAL ACADEMY,

Appellant,

—against—

THE STATE OF NEW YORK,

Respondent.

SIRS:

PLEASE TAKE NOTICE that the above-named appellant hereby appeals to the Court of Appeals from the Order of the Appellate Division, Third Department duly entered herein on the 6th day of May, 1975, which order affirmed the judgment of the Court of Claims entered therein on the 22nd day of April, 1974, Justices Herlihy and Larkin dissenting.

NOTICE OF APPEAL TO THE NEW YORK COURT OF APPEALS.

Dated: New York, New York
May 27, 1975

Yours, etc.

DAVIS POLK & WARDWELL
By RICHARD E. NOLAN
A Member thereof
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Tel.: (212) 422-3400

To:

HON. LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

JEAN M. COON
Assistant Solicitor General
Attorney for Respondent
Department of Law
The Capitol
Albany, New York 12224

MEMORANDUM DECISION OF THE COURT OF APPEALS.

[Printed in full in Appendix to Jurisdictional Statement; Officially reported at 39 NY 2nd 1021, 387 NYS 2nd 246, 355 NE 2nd 300]

ORDER OF THE COURT OF APPEALS, dated 7-13-76.

[Printed in full in Appendix to Jurisdictional Statement]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

[Printed in full in Appendix to Jurisdictional Statement]
